(3)

No. 94-1901

Supreme Court, U.S.
FILED
JUL 27 1995
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LA SOCIETE GENERALE IMMOBILIERE
and LSGI, INC.,
Petitioners,

v.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY
and THE CITY OF MINNEAPOLIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF OF PETITIONERS

MICHAEL C. MAHONEY
BENTLEY J. ANDERSON
MARK W. PEERY
MAHONEY, HAGBERG & RICE
A PROFESSIONAL ASSOCIATION
1500 Metropolitan Centre
Minneapolis, MN 55402
(612) 332-2226

CARTER G. PHILLIPS *
MARK D. HOPSON
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

July 27, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

7pp

TABLE OF AUTHORITIES

CASES

	Page
Dillard & Sons Constr., Inc. v. *Burnup & Sims Comtec, Inc.*, 51 F.3d 910 (10th Cir. 1995)	2
Griffin v. *United States*, 502 U.S. 46 (1991)	2, 4
Reeves v. *Acromed Corp.*, 44 F.3d 300 (5th Cir. 1995), *cert. denied*, 115 S. Ct. 2251 (1995)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1901

LA SOCIETE GENERALE IMMOBILIERE
and LSGI, INC.,
Petitioners,

v.

THE MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY
and THE CITY OF MINNEAPOLIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF OF PETITIONERS

In its petition, LSGI demonstrated that the Eighth Circuit, in direct conflict with the approach followed by other circuits, reversed outright a general verdict despite failing to consider substantial evidence supporting that verdict. The evidence which the Eighth Circuit failed to address—relating to the City's post-November 1987 efforts to prevent LSGI from performing its obligations—was neither minor nor inconsequential. To the contrary. that evidence comprised a major portion, perhaps even the majority, of the evidence LSGI introduced at trial and upon which the jury may have relied.

Respondents do not dispute the fundamental underpinnings of LSGI's petition. In sharp contrast to their arguments before the Eighth Circuit (see, e.g., Appellants'

Reply Br. 4), Respondents do not dispute here that all other courts addressing general verdicts have held that if *any* proper ground supports a verdict, that verdict must be either affirmed or, at a minimum, remanded for a new trial, even if the jury was given a legally erroneous instruction or if some factual basis upon which the jury may have relied is found to be insufficient. See *Griffin* v. *United States,* 502 U.S. 46 (1991); see also *Dillard & Sons Constr., Inc.* v. *Burnup & Sims Comtec, Inc.*, 51 F.3d 910 (10th Cir. 1995); *Reeves* v. *Acromed Corp.*, 44 F.3d 300 (5th Cir.), *cert. denied,* 115 S. Ct. 2251 (1995). And, while they assert that the Eighth Circuit "mentioned" certain facts relevant to LSGI's post-November 1987 claims,[1] Respondents do not contest that, before reversing the general verdict in this case, the Eighth Circuit neither addressed *each* of the post-November 1987 grounds which LSGI claimed independently supported the general verdict, nor specifically found each of them legally flawed or factually insufficient.

Thus, Respondents do not dispute that the Eighth Circuit failed to engage in the specific legal and factual inquiry required by all other courts, including this Court, to address the issue. Whether a court must engage in a specific legal and factual inquiry into all grounds upon which a jury may have relied in reaching its general verdict, or whether the court may instead reverse the verdict without determining whether the jury may have relied on a proper ground, is at the core of both questions presented by the petition. That issue of federal civil procedure is neither "parochial" nor "of little in-

---

[1] Opp. 7. Respondents fail to note, however, that those "mention[s]," some of which Respondents admit are obscure and indirect (*see id.* at n.5) are simply recitations in the Eighth Circuit's statement of facts. These "factual underpinnings" supporting the jury's general verdict were *never* discussed by the court. In any event, Respondents acknowledge that the court did not even "mention" all of them. *Id.* at 7.

terest"; rather, it is fundamental to the proper consideration of jury trials and general verdicts in the federal courts and, therefore, warrants this Court's review.

In claiming that this case is unworthy of review, Respondents argue that the Eighth Circuit did not abandon the rules governing general verdicts followed by the other circuits in favor of a novel and conflicting approach. They argue that the Eighth Circuit simply exercised its discretion not "to mention every piece of evidence when writing an opinion." Opp. 7. Respondents cite three circuit court opinions in support of this proposition. Each of these opinions holds that a court of appeals may, on an appropriate occasion, presume that a district court would have found a certain fact. Quite obviously, none of these opinions stands for the insupportable proposition that a court of appeals may sidestep its obligation to explore fully the factual and legal sufficiency of all grounds supporting a general verdict it ultimately reverses.

Respondents argue further that a court of appeals "must be *presumed* to have found that [the evidence which it did not address] did *not* support the jury's verdict." *Id.* at 8 (emphasis added). That presumption, however, which is necessary to reconcile the Eighth Circuit's decision with the decisions of all other courts, underscores, rather than obviates, the conflict between the Eighth Circuit and the other courts of appeals. In all other circuits, courts are affirmatively obliged to address and resolve the issue of whether *any* proper basis exists for the jury's verdict. This is a fundamental predicate for determining how to dispose of a case. Under the Eighth Circuit's approach, that fundamental inquiry is unnecessary.

Respondents' presumption likewise makes no sense. The core function of courts of appeals is to decide issues presented to them. To simply *presume* that a court has "carefully examined" (*id.* at 7) and decided an issue,

particularly one which is outcome-determinative, makes a mockery of this essential judicial function. Moreover, to presume that a court found evidence upon which a jury may have relied to be insufficient is fundamentally disrespectful of the role of the jury and at odds with the right to a trial by jury. As this Court held in *Griffin*, while jurors cannot be presumed to recognize a legally erroneous instruction, they "*are* well equipped to analyze the evidence." 502 U.S. at 59.[2]

In short, Respondents claim that the Eighth Circuit followed the same approach as other circuits. That simply is not true. In truth, the Eighth Circuit adopted an approach—and in so doing established a precedent—which is inconsistent with the constitutional right to a jury trial and which is fundamentally at odds with the approaches of all other courts of appeals and the approach of this Court in *Griffin*. Under the approach followed by all other circuits, courts of appeals faced with a flawed general verdict must affirmatively determine whether the jury relied on *any* proper ground and then determine—pursuant either to the rule of *Griffin* or to the rule of *Dillard* and *Reeves*—whether to affirm or to remand. Under the approach adopted by the Eighth Circuit, a court, relying on the presumption that evidence presented to the jury was *insufficient*, may simply reverse such a general verdict. These conflicting options

---

[2] In footnote 2 of their Opposition, Respondents misleadingly claim—without a supporting citation—that the trial court granted the City a directed verdict on the "issue" of Projects 2 and 3. Opp. 5 n.2. The court, however, simply ruled that the parties had not entered into a *new* and *distinct* contract with respect to Project 3, as LSGI had argued in the alternative. Trial Tr. Vol. IX, Feb. 15, 1993, at 4-8. The trial court *never* ruled that Respondents' actions with respect to Projects 2 and 3 did not constitute breaches of the original contract. Perhaps most telling is the fact that, when confronted with the issue of Projects 2 and 3 before the Eighth Circuit on motion for rehearing, Respondents made no claim that the issue was not properly before the court. *See* City's Opp. on Mot. for Reh'g.

have and will lead to confusion in the courts of appeals. This Court should review the decision of the court below to resolve that confusion and to determine the proper approach for reviewing general verdicts.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL C. MAHONEY
BENTLEY J. ANDERSON
MARK W. PEERY
MAHONEY, HAGBERG & RICE
A PROFESSIONAL ASSOCIATION
1500 Metropolitan Centre
Minneapolis, MN 55402
(612) 332-2226

CARTER G. PHILLIPS *
MARK D. HOPSON
PAUL E. KALB
NATHAN C. SHEERS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

July 27, 1995